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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 902

MICHAEL V. SCIORTINO,

Petitioner,

—v.—

THE HONORABLE ROBERT C. ZAMPANO,
UNITED STATES DISTRICT JUDGE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Question Presented	2
Constitutional Provision and Rule Involved	2
Statement	3
Reasons for Granting the Writ	5
Conclusion	12
APPENDIX:	
Opinion of Court of Appeals	1a
Conflicting Opinion of Court of Appeals for the District of Columbia Circuit in *Ross* v. *Sirica*	8a
Constitutional Provision Involved	34a
Motion of Petitioner Michael V. Sciortino for an Order in the Nature of a Writ of Mandamus	35a

Table of Authorities

PAGE

Cases:

Blue v. United States, 342 F. 2d 894 (D. C. Cir.), *cert. denied*, 380 U. S. 944 (1965) 7

Dancy v. United States, 361 F. 2d 75 (D. C. Cir. 1966) .. 7

Escobedo v. Illinois, 378 U. S. 478 (1964) 9

Holmes v. United States, 370 F. 2d 209 (D. C. Cir. 1966) 7

Jaben v. United States, 381 U. S. 214 (1965) 11

Marshall v. United States, 360 U. S. 310 (1959) 8

Massiah v. United States, 377 U. S. 201 (1964) 9

Ross v. Sirica, 380 F. 2d 557 (D. C. Cir. 1967) 5, 6, 7, 10, 11, 12

United States v. Aiken, 373 F. 2d 294 (2 Cir.), *cert. denied*, 36 U. S. L. Week 3144 (October 9, 1967) 6-7

United States v. Burr, 25 Fed. Cas. 30 (C. C. Va. 1807) 9

United States v. Gilchrist, 347 F. 2d 715 (2 Cir. 1965) 7

United States v. Heap, 345 F. 2d 170 (2 Cir. 1965) 7

PAGE

Wheeler v. Flood, 269 F. Supp. 194 (E. D. N. Y. 1967) .. 8
Wilson v. Anderson, 335 F. 2d 687 (D. C. Cir. 1964) 11

United States Constitution:

Sixth Amendment 3, 9

Statutes and Rule:

21 U. S. C. §331(q) 3

21 U. S. C. §360a(b) 3

28 U. S. C. §1254(1) 1

28 U. S. C. §1651(a) 4

Rule 5, Federal Rules of Criminal Procedure 2, 3, 5, 6, 7, 8, 9, 10, 12

Other Authorities:

Amsterdam, Segal, Miller, I TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES §133 (1967) 9

Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 2nd Sess., part 2, 49 (1965) 8

Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 2nd Sess., part 3, 220-221 (1966) 10

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Michael V. Sciortino prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on November 3, 1967 (1a).[1]

Opinion Below

The opinion of the court of appeals, as yet unreported, is printed in the appendix to this petition (1a).

Jurisdiction

The judgment of the court of appeals was entered on November 3, 1967 (1a). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

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[1] References to the numbered pages of the appendix to this petition are indicated _____ (a).

Question Presented

Does the return of an indictment by a grand jury eliminate the right of a criminal defendant, arrested pursuant to a U. S. commissioner's warrant, to a previously scheduled preliminary examination before the commissioner pursuant to Rule 5, Federal Rules of Criminal Procedure?

Constitutional Provision and Rule Involved

Petitioner contends that following an arrest upon a commissioner's warrant, he is entitled to a preliminary hearing pursuant to Rule 5 of the Federal Rules of Criminal Procedure which provides in part:

> "(c) —Preliminary Examination. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him."

Petitioner also maintains that his right to a preliminary hearing is reinforced by the Sixth Amendment to the United States Constitution (34a).

Statement

By an original mandamus action filed in the court of appeals, petitioner obtained appellate review of the rulings of the District Court for Connecticut relating to his right to a preliminary hearing in a criminal action in which petitioner is the defendant (1a, 35a).

In that criminal action (50a), petitioner—a Bridgeport, Connecticut, physician—was first arrested on June 22, 1967, upon a commissioner's warrant charging him with the unlawful selling of depressant and stimulant drugs in violation of 21 U. S. C. §§331(q) and 360a(b) (2a, 35a, 41a).

Following his arrest, petitioner was taken before a U. S. commissioner, who admitted him to bail without surety and, by agreement of counsel, continued until July 11, 1967, the preliminary hearing required by Rule 5 of the Federal Rules of Criminal Procedure (2a-3a, 35a-36a). The Government announced it would probably present the case to the grand jury on July 10, 1967 and would contend, if an indictment were returned, that the commissioner no longer had power to hold a preliminary hearing (3a).

On July 10, 1967, the day before the scheduled Rule 5 hearing, the Government presented the case against petitioner to the grand jury, which returned a three count indictment charging violations of 21 U. S. C. §§331(q)(2) and 360a(b) (3a, 36a-37a). All three counts are misdemeanors. Just prior to the grand jury action, petitioner, by motion dated and served upon the Government July 7, 1967, re-

quested the district court to restrain the Government from presenting the case to the grand jury and to discharge petitioner unless the Government proceeded to a preliminary hearing before the commissioner (3a, 36a, 45a-47a). Respondent, a United States District Judge for the District of Connecticut, denied petitioner's motion on July 10, 1967 (3a, 36a, 49a). Respondent's order, denying petitioner's motion to restrain the Government and to discharge petitioner unless a preliminary hearing were held, was the initial ruling challenged by petitioner in the court below (1a, 37a).

The July 11, 1967, preliminary examination was continued until July 24, 1967 by the commissioner who, at the request of petitioner, issued a subpoena directing the presence of a witness for that time (3a, 37a, 53a). Immediately prior to the scheduled hearing on July 24, 1967, respondent granted the Government's motion to quash the subpoena (3a, 37a). Respondent's ruling quashing the subpoena at the request of the Government was the second of respondent's rulings challenged in the mandamus action below (1a, 37a).

The jurisdiction of the court below was predicated upon 28 U. S. C. §1651(a) (35a, 38a). After hearing, the court denied relief, holding that the return of the grand jury indictment in the criminal action established probable cause and, therefore, eliminated petitioner's right to a preliminary hearing before the commissioner (1a-7a).

Reasons for Granting the Writ

This petition presents a single question which relates to the right of an accused to a preliminary hearing pursuant to Rule 5 of the Federal Rules of Criminal Procedure and which has wide impact upon the administration of criminal law in the federal courts. Review of the decision of the court below is called for because (1) it is in conflict with a decision of the Court of Appeals for the District of Columbia on the same issue; (2) it has decided an important question of federal law which has not been, but should be, decided by this Court; and (3) it has decided an important federal question through misreliance on a decision of this Court.

1. The decision of the court below in the instant case is directly in conflict with the decision of the Court of Appeals for the District of Columbia in *Ross* v. *Sirica,* 380 F. 2d 557 (D. C. Cir. 1967) (8a)—a conflict clearly recognized by the court below (6a).

In *Ross*—also an action in the nature of mandamus—the court held, as petitioner here unsuccessfully asserted, that the right to a preliminary hearing is not forfeited by the return of an indictment. In *Ross,* as here, the petitioner was arrested upon a warrant and brought before the commissioner who continued the preliminary hearing to afford the petitioner an opportunity to consult counsel. Before the preliminary hearing could be rescheduled, the Government presented the case to a grand jury, and an indictment was returned. Thereafter, when Ross sought to assert his right to a preliminary hearing, the district court, as here, ruled that as a result of the supervening indictment, Ross's right to a preliminary hearing before the commissioner had been forfeited.

In *Ross*, the court of appeals issued its writ of mandamus directing the district court to reopen the preliminary hearing, stating:

> "We have recognized that the preliminary hearing is an important right of an accused affording him '(1) an opportunity to establish that there is no probable cause for his continued detention . . . and (2) a chance to learn in advance of trial the foundations of the charge and the evidence that will comprise the government's case against him'. *Blue* v. *United States, supra,* 119 U. S. App. D. C. at 322, 342 F. 2d at 901 (footnote omitted). We have held that the accused is entitled to counsel at such hearings and that he may obtain subpoenas to compel the attendance of 'material witnesses reasonably requested . . .' Moreover, we have held that the right to a preliminary hearing, if timely asserted, is not forfeited solely by the later return of an indictment." *Ross* v. *Sirica, supra,* 380 F. 2d at 559 (10a).

The sharp conflict between the decision below and the *Ross* case is not an isolated instance of the schism existing between the Second Circuit and the District of Columbia Circuit with respect to the import of a supervening indictment upon the right to a Rule 5 hearing. Comparison of the authorities relied on by the two courts reveals that the conflict is deeply rooted in the purposes attributed to the preliminary hearing.

The court below held that the preliminary hearing did not have a discovery function but existed solely as a means for determining probable cause (5a). In so ruling, it felt bound by its prior decisions in *United States* v. *Aiken,* 373 F. 2d 294 (2 Cir.), *cert. denied,* 36 U. S. L. WEEK 3144

(October 9, 1967); *United States* v. *Gilchrist*, 347 F. 2d 715 (2 Cir. 1965); and *United States* v. *Heap*, 345 F. 2d 170 (2 Cir. 1965) (6a).

The District of Columbia court, on the contrary, viewed the preliminary hearing as an important defense device to discover in advance of trial the foundations of the charge and the evidence which will comprise the Government's case (10a). In so ruling, it also felt bound by its prior decisions in *Blue* v. *United States*, 342 F. 2d 894, 900 (D. C. Cir.), *cert. denied*, 380 U. S. 944 (1965); *Dancy* v. *United States*, 361 F. 2d 75, 77-78 (D. C. Cir. 1966); and *Holmes* v. *United States*, 370 F. 2d 209, 210 (D. C. Cir. 1966) (10a). In *Holmes*, Judge Wright had pointed out:

> "In Blue v. United States, *supra*, and in Dancy v. United States, . . . we have made it very clear that an effective preliminary hearing is one of the important rights of a defendant charged with crime—that such a hearing gives a defendant 'a chance to learn in advance of trial the foundations of the charge and the evidence that will comprise the government's case against him.'" 370 F. 2d at 210.

The conflict, then, between the Second Circuit and the District of Columbia Circuit, as now ripened by the decision in the instant case, is the product of irreconcilable interpretations concerning the scope and function of the Rule 5 preliminary hearing. The petitioner in *Ross*, by the sheer accident of having been arrested in the District of Columbia, was granted his right to a preliminary hearing. But petitioner here, because he was arrested in Connecticut rather than in the District of Columbia, has been denied that right in the same federal system. Such disharmony in the federal

system calls for a resolution by this Court by the exercise of its certiorari jurisdiction.

2. The conflict between the District of Columbia and the Second Circuit over the proper function of a Rule 5 hearing—a function as yet undefined by this Court—also deserves the Court's attention because of the issue's wide impact on the administration of criminal procedure. The Government's "widespread practice 'of delaying preliminary hearing until an indictment can be obtained,' 8 Moore's Federal Practice ¶5.04 [3]," thereby destroying the defendant's ". . . most valuable discovery technique available to him," *Wheeler* v. *Flood,* 269 F. Supp. 194, 196-197, 198 (E. D. N. Y. 1967), has potential impact upon more than 25,000 criminal defendants who appear each year before the 734 U. S. commissioners after arrest on criminal offenses.[2] Resolution of an issue with such dimension is a proper exercise of this Court's "supervisory powers to formulate and apply proper standards for an enforcement of the criminal law." *Marshall* v. *United States,* 360 U. S. 310, 313 (1959).

Petitioner's claim is in essence based on Rule 5. But it also gains strength from petitioner's rights in all "criminal prosecutions" to be confronted with the witnesses against him, to be informed of the nature and cause of the accusa-

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[2] The reports regularly filed by commissioners with the Administrative Office of the U. S. Courts do not disclose either the number or the nature of the preliminary hearings held or petty offenses tried by them. However, a special study was undertaken by the Administrative Office in the latter part of 1964 to develop information on these subjects. There were 26,729 defendants brought before the 734 commissioners for preliminary hearings in the fiscal year 1964. *Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary,* 89th Cong., 2nd Sess., part 2, 49 (1965).

tion and to have compulsory process, as guaranteed by the Sixth Amendment (34a). Certainly, the Sixth Amendment right to counsel applicable to "criminal prosecutions" is not limited to the actual trial of a case. *Massiah* v. *United States*, 377 U. S. 201 (1964); *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). Other Sixth Amendment rights involved here —to confront witnesses, to know the nature of the charge, and to have compulsory process—likewise cannot be limited to the trial itself. As Chief Justice Marshall said over 150 years ago, while sitting as a circuit judge:

> "Upon immemorial usage, then, and upon which is deemed a sound construction of the Constitution and law of the land, the court is of the opinion that any person charged with a crime in the courts of the United States has a *right, before as well as after indictment,* to the process of the court to compel the attendance of his witnesses." *United States* v. *Burr*, 25 Fed. Cas. 30, 33 (C. C. Va. 1807) (Emphasis added).

The involvement of these important constitutional rights affords added basis to review the decision below.

Effective supervision of criminal procedure in the federal courts, then, requires this Court to settle the question of whether the prosecution can flout Rule 5 and "proceed in a fashion which gives it the benefits of two different procedures—arrest without prescreening of the grand jury; indictment without discovery at the preliminary examination—and the disadvantages of neither." Amsterdam, Segal, Miller, I TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES §133 (1967).[3]

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[3] "Prosecutors . . . do everything within their power to avoid preliminary hearings," stated Professor Irving Younger, testifying before the Senate Subcommittee on Improvements in Judicial Machinery. He went on to say:

Petitioner's case presents the appropriate case for determining the proper function of a Rule 5 hearing. Significantly, in the *Ross* case, where the Government did not prevail, it avoided review by this Court. But it is not petitioner's cause alone that is here involved. Rather, this petition presents an issue, unresolved by this Court, hav-

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"... to my knowledge, no defendant in any criminal case in the southern district of New York has ever received a preliminary hearing. How is it done? When a defendant is arrested and is brought before the commissioner, an assistant U. S. attorney is present to represent the Government. The commissioner must, and does, inform the defendant of his right to a preliminary hearing. The commissioner will frequently go on to suggest to the defendant, either explicitly or implicitly, that no purpose would be served by a preliminary hearing, and that the defendant should waive it. If the defendant waives a preliminary hearing, the matter is ended. If the defendant says that he does not wish to waive a preliminary hearing, the commissioner will set the hearing down for a date 5 or 6 days hence. If possible, the prosecutor will then simply obtain an indictment before the date for the preliminary hearing; the hearing thus becomes moot. . . .

"If, for whatever reason, the prosecutor cannot obtain an indictment within that time, he calls the commissioner's secretary (or, more frequently, has a clerk in the office of the U. S. attorney call the commissioner's secretary) and postpones the hearing. He may then obtain an indictment before the new adjourned date. If he fails to do so, he will adjourn the hearing again, and so on and so on. . . .

"The defendant is never given an opportunity to be heard on the question whether the hearing date should be adjourned. He is usually not even given notice of the prosecutor's application for an adjournment. Indeed, the prosecutor does not even apply to the commissioner for an adjournment. The practice has been for the prosecutor (or a clerk from his office) simply to mark on the commissioner's calendar the fact that the hearing has been adjourned. The commissioner may not even be aware of the adjournment. He pays little attention to his schedule of hearings, because he knows that no hearing will ever take place or has ever taken place." *Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 89th Cong., 2nd Sess., part 3, 220-221 (1966).

ing wide impact on the administration of criminal justice. Absent review here, then, "there is danger that the violations may occur so frequently that the interests of the general public, as well as the individual petitioner, are directly at stake." *Wilson* v. *Anderson,* 335 F. 2d 687, 691 (D. C. Cir. 1964).

3. Review by this Court is also appropriate because the decision of the Court below has determined an important federal question by misreliance on this Court's decision in *Jaben* v. *United States,* 381 U. S. 214 (1965), in which the Court mentioned in *dictum* that the Government must afford the defendant a preliminary hearing "unless before the preliminary hearing is held, the grand jury supersedes the complaint procedure by returning an indictment." 381 U. S. at 220. The court below relied on the *Jaben* dictum as direct authority for the proposition that the return of an indictment eliminates the necessity for a preliminary examination (4a). The *Ross* court, however, properly noted that the defendant in *Jaben* had made no effort to obtain a preliminary hearing during the one month interval between the filing of the complaint and the return of the indictment, and stated:

> "*Jaben* does not undermine the holding in *Blue* that an accused who demands the preliminary hearing as is his right is entitled to such a hearing and that, if the point is properly and timely pressed, a denial of that hearing cannot be excused by pointing to an intervening grand jury indictment." 380 F. 2d at 560-561 (14a).

Conclusion

Rule 5 forthrightly states that once an accused is arrested he must be presented before a commissioner who "shall" hear the evidence. The decision of the court below, which petitioner contends is erroneous and which is concededly in conflict with the decision of another circuit, rejects this clear command of Rule 5.

For these reasons, then, this Court should—and petitioner requests that it does—issue its writ of certiorari to review the judgment of the court below.

Respectfully submitted,

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December 7, 1967.

APPENDIX

INDEX TO APPENDIX

UNITED STATES COURT OF APPEALS

Opinion of Court of Appeals 1a

Conflicting Opinion of Court of Appeals for the District of Columbia Circuit, Filed 4a

[Appendix Page Numbers Illegible] November 8, 1966

Motion of Petitioner Michael V. Severino for an Order in the Nature of a Writ of Mandamus 20a

Exhibit A 20a

Exhibit B 41a

Exhibit C 43a

Exhibit D 46a

Exhibit E ..... [illegible]

Exhibit F 48a

Exhibit G 50a

Exhibit H ..... [illegible]

Petition for an Order in the nature of a writ of mandamus directing the Honorable Robert C. Zampano, United States District Judge for the District of Connecticut, to order a preliminary examination of petitioner pursuant to Rule 5(c) of the Federal Rules of Criminal Procedure.

Denied.